Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 93-36
Tariff Filing Requirements for	)	
Nondominant Common Carriers	)	

REPLY COMMENTS

MCI TELECOMMUNICATIONS CORPORATION

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SUMMARY

The proposed tariffing rule revisions for non-dominant carriers should be promptly adopted by the Commission in order to help counter the foreseeable anti-competitive effect resulting from the Court's decision in AT&T v. FCC, which invalidated the Commission's Forbearance Rule. None of the objections offered by opponents of the revisions is warranted, as the Commission plainly possesses the authority necessary to modify both the notice and tariff form rules applicable to the filing of required tariffs by non-dominant carriers.

Furthermore, there is no merit to the contention that a failure to extend further tariff streamlining to carriers classified and regulated by the Commission as "dominant" violates the U.S. Constitution, or that this particular proceeding can be used to accommodate extension of the rules proposed to other than non-dominant carriers.

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REPLY COMMENTS

MCI Telecommunications Corporation (MCI) hereby submits its Reply Comments in support of the Commission's proposals in its Notice of Proposed Rulemaking, FCC 93-103, released February 19, 1993, (NPRM) to further streamline the tariff filing requirements applicable to non-dominant carriers.[1/]

As MCI indicated in its initial Comments, the Commission has substantial public interest and statutory grounds, in the absence of its permissive tariffing policy,[2/] to undertake at this time to align its tariffing requirements for non-dominant carriers with its current perception of what is best for the further development of a robust and healthy competitive interexchange marketplace.

[1/] See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, First Report and Order, 85 FCC 2d 1 (1979); Second Report and Order, 91 FCC 2d 59 (1982)(Competitive Carrier).

[2/] In AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), the Court vacated the Commission's so-called "forbearance rule," described by the Commission in the NPRM (¶ 9, n. 20) as "a cornerstone of the Commission's regulatory regime ever since [its] adoption." See Competitive Carrier, 95 FCC 554 (1983).

Proposed Tariffing Rule Revisions

Most parties filing comments in this proceeding agree that the Commission is authorized to permit non-dominant carriers to file and make effective their tariffs on one day's notice and to accord them substantial flexibility concerning the form of their tariffs.[3/] Furthermore, many parties, with the notable exception of those not likely in the near term to benefit from the proposed

Contrary to AT&T's assertion, MCI v. FCC and AT&T v. FCC by no means suggest that the Commission's tariff pricing proposal is beyond its authority. Those cases vacated the Commission's mandatory and permissive forbearance rules, respectively, on the ground that they violated the tariffing requirement of Section 203(a) of the Act. In the view of those Courts, the Commission's forbearance rules were flawed because they eliminated, rather than merely modified, the tariff-filing requirement. By contrast, the Commission's instant tariff pricing proposal satisfies the Act's requirements because it modifies the form of the tariffing obligation.

AT&T misconstrues the explicit language of Section 203, which clearly supports the Commission's proposal. Section 203(a) states that carriers shall "file with the Commission and print and keep open for public inspection schedules showing all charges . . . . Such schedules shall contain such other information, and be printed in such form . . . as the Commission may by regulation require, and each such schedule shall give notice of its effective date . . . ." Section 203(b)(1), in turn, states that "[n]o change shall be made in the charges" so filed, except upon notice as specified by the Commission, and provides that those charges "shall be published in such form and contain such information as the Commission may by regulations require." However, the directives of Sections 203(a) and 203(b)(1) are subject to the important proviso in Section 203(b)(2), which states that "[t]he Commission may, in its discretion and for good

cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions . . . ." (Emphasis added).

The Commission's proposal satisfies the literal terms of Section 203 because it represents the exercise of the Commission's discretion, for good cause, to modify the Section 203(a) requirement. Indeed, the proposal, MCI submits, fully meets the demands of the statute. As Section 203(a) requires, non-dominant carriers would be filing "schedules" of "all charges," i.e., their maximum rates or ranges of rates.

The Commission's authority to permit this tariffing approach

The Special Permission and Enlarged Notice decisions flatly contradict AT&T's position, so it chooses instead to rely upon irrelevant Commission decisions enforcing its existing tariff pricing rules.[7] AT&T further argues that the Commission's proposal would improperly circumvent Section 203(a) by not requiring carriers to disclose the conditions entitling a customer to a particular rate below the maximum or within a rate range. AT&T asserts that, as a result, Section 203(a) would fail to implement, as required, the nondiscrimination constraints of Section 202(a) of the Act. Finally, AT&T contends that the Courts' disapproval of rate range tariffs under the Interstate Commerce Act (ICA) indicates that the Commission lacks the authority to proceed with its proposal.[8] AT&T's contentions are baseless for the reasons explained below.

First, in stating the maximum rate or range of rates, a non-dominant carrier would be disclosing its "charges" just as Section 203(a) requires. Such publication, in conjunction with a recitation of other terms and conditions affecting service, would provide the information needed by consumers to decide whether to purchase of a non-dominant carrier's service. If a customer did not qualify for either the maximum or minimum rate but, rather, qualified for a rate within the tariffed range, the carrier nonetheless would be obligated to charge the applicable rate to all other similarly situated customers.

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[7] AT&T at 5-7.

[8] AT&T at 4-9, 11-13.

In any event, the publication of detailed rates, as AT&T advocates, would not necessarily inform a customer of the rate it would be charged any more than AT&T's current tariffs inform prospective customers of the rates they would be charged for similar AT&T services. AT&T has filed a profusion of explicit and de facto customer-specific tariffs, including several hundred contract-tariff and Tariff 12 offerings. Those reflect discrete charges negotiated with individual customers. From the standpoint of a consumer considering the purchase of AT&T service, the concept of "standard AT&T tariff rates" for AT&T's business services, at least, has been rendered essentially meaningless. AT&T treats each one of its customers as "unique" when it negotiates today a business arrangement that subsequently is incorporated into a tariff.[9/]

Consequently, as a practical matter, AT&T tariffs do not describe the precise rates a new customer would be charged for AT&T service. Instead, the tariffs collectively establish a range of rates that AT&T charges for service, which range -- or any rate therein -- may or may not be applicable to a given customer's circumstances in a contract negotiation.[10/] If a negotiated rate should fall outside the existing range, the

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[9/] Thus, AT&T doubtless would argue, each of these affected customers is not "similarly situated" vis-a-vis others and, therefore, the non-discrimination provisions of Section 202 (a) of the Act are not applicable.

[10/] AT&T has filed well over two hundred individually negotiated contracts in various tariff "forms" with the Commission and, with few exceptions, it has only a single customer for each one of the filed contracts.

covering tariff for the new customer simply would establish a new range. Accordingly, the Commission's proposal to allow non-dominant carriers to state either a maximum rate or a range of rates would effectively afford purchasing consumers the same degree of information about applicable charges as the information contained today in AT&T's tariffs.[11/]

Second, contrary to AT&T's protestations, the Commission's proposal would not negate the nondiscrimination requirements of Section 202(a) of the Act. The Commission predicated its streamlined regulatory policy on the conclusion that non-dominant "firms lacking market power simply cannot rationally price their services in ways which, or impose terms and conditions which, would contravene Sections 201(b) and 202(a) of the Act."[12/] The Commission's experience in supervising non-dominant carriers' tariffs confirms that those carriers cannot violate Section 202(a). As the Commission notes in its NPRM, it has never needed to suspend and investigate a non-dominant carrier's tariff and has rejected such a tariff only once, and not on Section 202(a)

[11/] Significantly, it would appear to be easier for consumers to consult a non-dominant carrier's tariff to ascertain price potential than it would to obtain similar AT&T information through examining several hundred tariffs.

[12/] Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Common Carrier Services, 85 FCC 2d 1, 21 (1980). This principle is so well established that it is beyond dispute. Furthermore, it is a principle that renders unacceptable, not to mention particularly "regulatory" in nature, the proposal made by the Ad Hoc Telecommunications Users Committee in connection with tariff revisions filed by non-dominant carriers.

grounds.[13] Moreover, since non-dominant carriers are confronted with intense competition from AT&T, the dominant interexchange carrier, their rates are always justified by competitive conditions and, therefore, they always have an absolute defense against any claim of unreasonable discrimination.[14]

Given the Commission's findings concerning the inability of non-dominant carriers to violate Section 202(a), which neither MCI v. FCC or AT&T v. FCC challenges, and its experience in regulating those carriers, detailed pricing information in non-dominant carriers' tariffs would not implement the requirements of Section 202(a) any more effectively than will the use of maximum rates or rate ranges in their tariffs. If non-dominant carriers cannot engage in unreasonably discriminatory pricing conduct, the form of their rates -- expressed specifically in detail or as a maximum or range -- is immaterial.

In any event, AT&T and others are unharmed by the lack of detailed pricing information in non-dominant carrier tariffs. AT&T was never impeded in the past from competing successfully by the absence of pre-filed, price-specific information, when non-dominant carriers followed the Commission's forbearance rule. It, therefore, is evident that AT&T would continue to be able to

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[13] NPRM at ¶ 14; see Capital Network Systems, Inc., 6 FCC Rcd 5609 (Com. Car. Bur. 1991)(tariff rejected for lack of clarity, specificity and misidentification of customer).

[14] See, e.g., Ad Hoc Telecommunications Users Committee v. FCC, 680 F.2d 790 (D.C. Cir. 1980); American Broadcasting Co. v. FCC, 663 F.2d 133 (D.C. Cir. 1980); American Trucking Ass'n v. FCC, 377 F.2d 121 (D.C. Cir. 1966), cert. denied, 386 U.S. 943 (1967).

compete effectively in the future under the proposed non-dominant carrier tariff-filing approach.

Third, contrary to AT&T's contention, questions concerning the lawfulness of rate range tariffs under the ICC's regulatory scheme has no bearing on the lawfulness of the Commission's proposal.[15] AT&T's argument rests on the faulty premise that the tariff-filing authority of this Commission and the ICC are identical. In fact, notwithstanding "similarities" between the Interstate Commerce Act (ICA) and the Communications Act, this Commission cannot be "restrict[ed] . . . to a course of action that has been dictated by the requirements of the transportation industry."[16]

Furthermore, the Court in Enlarged Notice expressly denied AT&T's argument that Section 203 confers no greater powers on this Commission than the powers accorded the ICC under Section 6(3) of the ICA, from which Section 203 derives. 503 F.2d at 617. The Court flatly declared that it is "clear that the congressional intent" in enacting the Communications Act "was not to provide a carbon copy of the Interstate Commerce Act." Id. at 616. Consequently, the policies and experience of the ICC are immaterial in evaluating the Commission's proposal; the Commission's authority under Section 203(b)(2) to modify the tariff filing requirements of Section 203(a) must be determined

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[15] See AT&T at 7-9, citing Regular Common Carrier Conference v. FCC, 793 F.2d 376 (D.C. Cir. 1986).

[16] General Telephone Co. of the Southwest v. U.S., 449 F.2d 846, 856 (5th Cir. 1971).

with reference to the Communications Act alone.

The fundamental error with AT&T's argument is revealed by the Courts' reaction to the tariff-pricing policies of the Federal Energy Regulatory Commission (FERC). Under AT&T's reasoning, FERC should have the authority to permit rate range tariffs since the ultimate ancestor of Sections 4 and 5 of the Natural Gas Act is, like Section 203 of the Communications Act, the ICA. However, the Courts have held that FERC indeed may permit tariffs that "provide for ceilings and floors, with the pipeline free to charge anywhere within that band." Associated Gas Distributors, Inc. v. FERC, 824 F.2d 981, 1007 (D.C. Cir. 1987), cert. denied, 485 U.S. 1006 (1988).

Other Matters

Southwestern Bell Corporation (SBC) argues that any failure by the Commission to extend its tariff notice, form and pricing proposals to dominant local exchange carriers, such as SBC, would be a violation of Constitutional equal protection guarantees.[17/] In advancing this contention, SBC apparently does not understand the elementary principles of the equal protection doctrine.

The equal protection guarantee is not violated when there is no invidious discrimination between classes. If there is a rational basis for treating one class of persons differently than another class -- and there clearly is here -- then the two classes are not in similar circumstances and the equal protection guarantee is not violated. The Commission's proposals do not

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[17/] SBC at 4-6.

create or result in any invidious discrimination relative to dominant carriers. Since only non-dominant carriers are without market power and thus the ability to engage in conduct that violates the Communications Act, the Commission rationally decided that they merit less stringent regulation. By contrast, the Commission chose not to extend its further streamlining proposals to dominant carriers since, by contrast, they possess the ability and incentive to engage in unlawful conduct. Accordingly, the latter classification of carriers requires much closer scrutiny. Consequently, the two classes of carriers do not present "similar circumstances" and the different regulatory policies resulting from the Commission's instant proposals are therefore reasonably related to its statutory responsibilities and valid on equal protection grounds.[18/]

Finally, not content with the substantial reduction in tariff regulation allowed them by the Commission over the last few years, AT&T and the BOCs argue that the Commission must

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[18/] In fact, SBC's position is not supported by the cases it cites, Soon Hing v. Crowley, 5 S.Ct. 730 (1885); Yick Wo v. Hopkins, 6 S.Ct. 1073 (1886); Garrett v. FCC, 513 F.2d 1056 (D.C. Cir. 1975). In those cases, the Court said there had to be a rational basis for treating two classes of persons differently. See, e.g., City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 439-442 (1985)("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."); Plyler v. Doe, 457 U.S. 202, 216 (1982)("'the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.'" [citing Tigner v. Texas, 310 U.S. 141, 147 (1940)]).

extend its proposed tariff streamlining rules to their services.[19] AT&T claims that its inbound and outbound services are fully competitive and require no greater regulatory scrutiny than do the services of non-dominant carriers. The BOCs argue that the Commission should determine their dominant status on a market-by-market basis and apply its proposed streamlined rules to many of their services. Brazenly, but mistakenly, they contend that, in light of their impending duty to offer special access expanded interconnection to nascent competitive access providers, they will confront considerable competition.

The short answer to these contentions is that these carriers are appealing for regulatory "reclassification" at the wrong time and, clearly, in the wrong proceeding. In the instant proceeding, the Commission, to offset the pro-competitive ills brought about by AT&T v. FCC, is seeking to further relax and refine the tariff filing obligations applicable to non-dominant carriers, a classification never accorded AT&T or the BOCs.[20] Moreover, the Commission's rationale for those proposed rules -- that non-dominant carriers do not require strict regulatory

in this proceeding.

Conclusion

For all the foregoing reasons, as well aa those contained in its initial Comments, the Commission promptly should adopt the changes proposed in the NPRM.

Respectfully submitted,

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